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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)

Implementation of the Local Competition)
Provisions in the Telecommunications Act)
of 1996)

CC Docket No. 96-98

REPLY COMMENTS OF BELL ATLANTIC

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SUMMARY

The comments filed in this proceeding by potential local telephone competitors betray a rather stark division. On one side of the divide, the long distance incumbents press a variety of claims designed to benefit resellers, to deter entry by legitimate facilities-based competitors, and to block the introduction of much needed competition into the long distance business. On the other side of the divide, facilities-based competitors recognize the long distance carriers' claims for what they are, and oppose them.

Ultimately, however, Congress's objective was to promote efficient facilities-based entry in all segments of the telecommunications business -- local and long distance alike -- and not to require existing service providers and their customers to effectively subsidize new entrants. As Congress recognized, injecting additional competition into all markets will provide the greatest benefit to consumers, and promote infrastructure investment and economic growth.

The best way to achieve this objective is to limit any rules adopted here to broad guidelines that will allow negotiations to work as Congress intended. Contrary to the claims of some, the Commission should not adopt detailed prescriptive rules that preempt negotiators or the states. This latter approach is barred by the terms of the Act itself. Moreover, the proponents of detailed national rules base their claims on a series of myths that are belied by the facts: myths that states cannot be counted on to promote

competition, that incumbents will be intransigent in negotiations, and that potential competitors are infants in need of protection. In reality, the comments filed by state commissions here confirm that they are devoted to introducing local competition, the supposedly “intransigent” incumbents have already struck over 50 agreements, and the so-called infants are some of this country’s largest and most sophisticated communications firms, including the likes of AT&T, MCI, Time Warner and TCI.

As the parties that are legitimately interested in facilities-based competition confirm, long distance carriers cannot use section 251 as a way to evade interexchange access charges -- either directly or indirectly by buying unbundled network elements and piecing them back together. Similarly, they also cannot evade the Act’s resale pricing standards by reassembling network elements without investing a dime in their own local exchange facilities. The claims of the long distance incumbents to the contrary cannot be squared with the language and structure of the Act, and are contrary to sound public policy. In fact, by eliminating the current sources of contribution to covering the total cost of operating a facilities-based network, the arguments of the long distance incumbents would deter investment in such facilities by incumbents and potential entrants alike.

Likewise, facilities-based entrants generally agree with Bell Atlantic that the Commission should adopt an initial set of interconnection points and network elements that are feasible today, and put in place a mechanism, such as our proposed bona fide request process, that will allow the list to evolve as circumstances change. And while the long distance incumbents urge extensive lists of unbundled elements that

they claim should be mandated, their more extreme demands -- such as sub-loop unbundling and the ill-defined and ever-changing switch platform “concept” -- are opposed by the very type of facilities-based competitors that they purportedly are designed to benefit.

When it comes to pricing, however, several competitors close ranks in a united quest for a free lunch -- a lunch paid for by the customers of the LECs. In fact, some parties go so far as to claim that the LECs should be required to set their prices equal to the total service long run incremental cost of an idealized and purely hypothetical network that a provider might choose to build if it were starting from scratch on a blank slate, or “TSLRIC-BS.” But as Professor Alfred Kahn and Dr. Timothy Tardiff explain, the simple fact is that the LECs are not starting on a blank slate, and the only costs that are relevant are the actual costs of the LECs. Moreover, in order for LECs to recover their total costs and earn a reasonable profit, they must also be permitted to recover a contribution to the joint and common costs of operating their joint use networks, and to recoup any unrecovered historical costs. Any other result would deter additional investment in the LECs’ networks, violate the commands of the Act and, as Professor Richard Epstein explains, constitute a taking in violation of the Fifth Amendment.

The most blatant plea for a government handout comes from the proponents of “bill and keep,” which is merely code for a reciprocal compensation rate that not only is below cost, but is literally zero. A more appropriate name would be “bilk and keep,” since it will bilk LECs’ customers out of their money in order to subsidize entry by some of the country’s largest companies. By whatever name, a

regulatorily mandated price of zero would violate the Act, the Constitution, and sound economic principles. And the proponents of bill and keep cannot change this result by describing it as only an interim arrangement.

Finally, the long distance incumbents urge the Commission to adopt rules that would artificially inflate the size of any wholesale discount, and expand the scope of the LECs' resale obligations beyond what is required by the Act. Doing so, however, not only is beyond the Commission's statutory authority, but would serve only to give the long distance incumbents an advantage over legitimate facilities-based entrants.

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REPLY COMMENTS OF BELL ATLANTIC¹

I. Introduction

The comments filed in this proceeding by potential local telephone competitors betray a rather stark division. On one side of the divide, the long distance incumbents press a variety of claims designed to provide a competitive advantage to resellers, to deter entry by legitimate facilities-based local competitors, and to block the introduction of much needed competition into the long distance business. On the other side of the divide, facilities-based competitors recognize the long distance carriers' claims for what they are, and oppose them -- claims that range from their attempts to evade interexchange access charges and the resale provisions of the Act, to claims that the LECs should be required to unbundle their networks in ways that are not needed to enter the market and compete. When it comes to pricing, however, several competitors close ranks in a united quest to use the LECs' network facilities at rates that do not cover the total cost to provide them, and in some instances literally for free.

Ultimately, however, Congress's objective was to promote efficient facilities-based entry in all segments of the telecommunications business -- local and long distance

¹ The Bell Atlantic telephone companies serve Delaware, the District of Columbia, Maryland, New Jersey, Pennsylvania, Virginia, and West Virginia.

alike -- and not to require existing service providers and their customers to effectively subsidize new entrants. As Congress recognized, injecting additional competition into all markets will provide the greatest benefit to consumers, and will promote infrastructure investment and economic growth.

II. The Commission Should Adopt Broad Guidelines That Do Not Preempt Negotiations or The States

Any rules adopted by the Commission should be limited to general guidelines that will promote negotiations over regulatory litigation and gamesmanship. Nonetheless, some parties, led by the long distance incumbents and their allies, urge the Commission to adopt detailed national rules that would dictate the result of private negotiations and preempt the states. Their arguments are misplaced.

Those who urge the Commission to dictate the minute details of local interconnection arrangements ignore the fundamental limitations on the Commission's jurisdiction. As addressed in our opening comments and in the comments of a number of state commissions, see, e.g., Bell Atlantic Br. at 2-8; NARUC Br. at 9-10; Pennsylvania PUC Br. at 18; Virginia SCC Br. at 1, section 2(b) of the Communications Act grants authority over these inherently intrastate arrangements to the states and the 1996 Act reinforces, rather than alters, this fundamental allocation of authority. For example, section 252(e) expressly assigns the states authority to determine whether such arrangements are in the public interest, section 252(d) assigns the states jurisdiction over the pricing of these arrangements, and section 253 bars the Commission from preempting competitively neutral state measures to promote universal service in the new environment created by the Act.

Even apart from this insurmountable legal barrier, however, the proponents of detailed preemptive rules base their claims on a series of myths that are readily debunked:

a. The state roadblock myth. Contrary to the claims of some, the comments of state regulators make clear that they are equal to the task of promoting competition in their local markets. See, e.g., NARUC Br. at 22-29; Maryland PSC Br. at 25-26; Pennsylvania PUC Br. at 15-18; Virginia SCC Br. at 3-4. In fact, many states already have adopted rules opening their local markets to competition (including several that did so prior to passage of the 1996 Act), and many others are now in the process of doing so. And to the extent that there are states in need of guidance, and we are aware of none, adopting general guidelines such as those described in our opening comments would provide it without broadly preempting negotiations or state commissions across the board.

b. The intransigent incumbent myth. Some parties claim that detailed rules are necessary to force the LECs to negotiate reasonable arrangements. Their claims, however, are contradicted by the facts. In reality, the incumbent Bell companies have a very strong incentive to enter reasonable agreements in order to obtain long distance relief. In fact, over 50 separate agreements already have been struck. While the likes of AT&T and MCI may be dragging their feet and making unrealistic demands in the hopes of delaying long distance competition, the flow of daily press reports makes clear that legitimate facilities-based entrants like MFS, Time Warner and others are pressing ahead with negotiations, announcing agreements, and in places like Maryland and Pennsylvania are already providing competing local telephone service.

c. The infant entrant myth. Another claim made here is that infant entrants need the protection of detailed rules to offset the greater negotiating strength of the incumbents, and to avoid having to go through arbitrations in 50 states to enter the market on a national basis. But the prospective entrants -- such as AT&T (market value of \$98 billion), MCI (\$19

billion), MFS (\$4 billion), Time Warner (\$17 billion), TCI (\$13 billion), and TCG (owners' combined market value of over \$25 billion) -- are hardly infants, and this is especially true of those parties who plan to enter on a national basis. Nor are they at a negotiating disadvantage with the incumbents. On the contrary, they are sophisticated communications companies in their own right, and their success to date in obtaining negotiated agreements belies the notion they are at a disadvantage to anyone. In any event, since the Act gives all potential new entrants the right to the same agreement that any other local competitor reaches with the incumbent, 47 U.S.C. § 252(i), the notion that arbitrations might be needed in every state before an entrant could begin operations is fanciful.

III. Efforts By The Long Distance Incumbents To Circumvent Access Charges and the Resale Provisions of the Act Must be Rejected

As Chairman Hundt has recognized, it would "not be sound policy" to allow the long distance incumbents to use section 251 as a way to circumvent the Commission's access charge rules and achieve a "flash cut reform of access."² Indeed, even the long distance incumbents seem to recognize that section 251 cannot legitimately be interpreted to apply to interexchange access directly, and pay only passing lip service to their previous claim that it does. Nonetheless, they argue that they should be allowed to evade access charges indirectly -- and similarly to circumvent the resale provision of the Act -- by purporting to buy unbundled network elements and piecing them back together to provide end-to-end service (both local and long distance). Their arguments, however, are merely one part of the long distance incumbents'

² Speech of Reed E. Hundt, "The Telecommunications Act of 1996: Evolution Not Revolution" at 6 (May 10, 1996) (delivered by Joe Farrell, Chief Economist).

campaign to obtain an advantage over all facilities-based competitors, incumbents and new entrants alike.

As we addressed in our opening comments, attempts to indirectly circumvent the access charge regime are both contrary to public policy, and inconsistent with the language and structure of the 1996 Act. Bell Atl. Br. at 12-14. The parties who are legitimately interested in promoting facilities-based local competition agree. As they recognize, any interpretation of the Act that would permit carriers to circumvent the Part 69 access charge rules “is overbroad, and undermines the goals of the 1996 Act.” Time Warner Br. at 61.³

Similarly, allowing the long distance incumbents to provide service using only unbundled elements “would subvert the resale pricing mechanisms of the 1996 Act,” and “[f]acilities-based competition would likely be destroyed, in plain contradiction of Congressional intent.” MFS Br. at 38, 39. Consequently, the unbundling provision can only rationally be read to allow competitors to supplement some of their own local exchange facilities with elements purchased from the LEC -- not to allow the long distance incumbents to engage in resale by another name. *Id.* at 39-40; see also Bell Atlantic Br. at 12-14. A different result would run afoul of “the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative” -- in this case the separate resale pricing standard. Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249, (1985) (quoting Colautti v. Franklin, 439 U.S. 379, 392 (1979); accord United States v. Nordic Village

³ See also Jones Br. at 6 n.5 (interexchange carriers “cannot purchase the network elements that comprise ‘switched access’ and immediately avoid paying the subsidies included in typical LEC switched access rates”); Pennsylvania PUC Br. at 32 (“interconnection and unbundled elements... may not legally displace [the] interstate access charge regime”); MFS Br. at 65 n.75 (competitors may deliver both local and interexchange traffic, but “different rates and terms may apply ... depending upon the purpose for which they are used”).

Inc., 112 S.Ct. 1011, 1015 (1992) (statute must be interpreted to attach “practical consequences” to each section).⁴

Nor can the long distance incumbents be allowed to evade the Act’s resale provisions by purporting to buy retail services -- such as custom calling or CLASS services -- as “network elements,” or by playing a game of “mix and match,” buying below cost services under the resale provision and above cost vertical services as network elements. These are services, not physical elements of the LECs’ networks.⁵ As a result, they are subject to the separate pricing standards that apply when carriers resell the LECs’ retail services. See U.S.C. § 252(d)(3). Allowing the long distance carriers to evade this standard will render the resale provision meaningless, eliminate the contribution that these services currently provide to the total cost of operating a facilities-based network, and affirmatively deter facilities-based entry. See MFS Br. at 38-39; Sprint Br. at 23-25.

IV. The Commission Should Limit Its Rules To An Initial Set of Interconnection Points and Network Elements, And A Process For the Set to Evolve

The long distance incumbents urge an extensive list of elements and points of interconnection they claim should be offered immediately as a precondition to long distance relief. See, e.g., AT&T Br. at 17; MCI Br. at 16-18; LLDS Br. at 41-42. In contrast, facilities-based entrants agree with Bell Atlantic that the Commission should adopt an initial set of

⁴ Allowing the major long distance carriers to glue unbundled network elements together to provide both local and long distance service also risks allowing them to circumvent the joint marketing restriction contained in section 271(e)(1) -- which on its face applies only to resale arrangements -- writing a second provision out of the Act.

⁵ Nor are they the type of “features, functions, or capabilities” that Congress described in defining network elements -- such as numbers, databases and signaling systems -- all of which are necessary means to provide basic telephone services, and not services in and of themselves. 47 U.S.C. § 153(29).

interconnection points and network elements -- that generally are technically feasible now -- and put in place a process, such as our bona fide request ("BFR") procedure, that will allow the list to evolve as technology and the needs of competing carriers change. See, e.g., Time Warner Br. at 44-45; MFS Br. at 36; TCG Br. at 34; see also Northern Telecom Br. at 8; Sprint Br. at 21-22, 28-29.⁶

A. The Bona Fide Request Procedure Allows Competing Providers To Obtain Interconnection And Network Elements That Meet Their Needs

As we demonstrated in our opening comments, a BFR process has the advantage of imposing concrete deadlines on the LECs for responding to requests, requiring technical experts to solve technical issues, and providing for prompt resolution of any disputes. Bell Atlantic Br. at 17. An equally important benefit, however, is to protect the LECs, their vendors and ultimately their customers from sham requests. Indeed, the extensive lists of unbundling demands from the long distance incumbents here emphasize the need for these protections. Absent such safeguards, LECs and manufacturers alike would be forced to expend enormous amounts of time and resources to develop the capabilities to unbundle elements for which there may be little or no demand, and customers of the LECs would be forced to bear the costs of those efforts.⁷

It is critical that competing carriers pay the full costs of providing the arrangements they request, and that they be required to make the same arrangements in their

⁶ This is not to suggest that all of these parties agree in every respect on how the Commission should proceed, or that none asks for things that are not feasible today without further developmental work. On the whole, however, the dramatic difference in approach speaks volumes about the motives of the long distance incumbents.

⁷ Ironically, this also would mean that manufacturers "will have less resources available for other research and development activities . . . potentially threatening the level of continuing innovation in the telecommunications marketplace." Nortel Br. at 6.

own networks available to others on a reciprocal basis. See Bell Atlantic Br. at 17-20. Some commenters have argued, however, that the Commission should not impose on competing carriers the duties the Act assigns to incumbent LECs. See TCG Br. at 13-14. Consequently, new entrants should not immediately take on the full burdens of incumbent LECs. Rather, where a competing carrier requests that the incumbent develop a new interconnection point or unbundled element, the competing carrier should be required to pay the cost of fulfilling that request, plus commit to make the same interconnection point or element in its network available to the incumbent. Such a "real world" check on potentially unrealistic -- or purely tactical -- unbundling requests will further assure that resources are directed first to those efforts that will advance the development of local exchange competition.

Moreover, many of the long distance incumbents' demands are interposed plainly to delay long distance entry. To prevent them from gaming the regulatory process, the Commission should find that an incumbent LEC is in compliance with their duties under section 251 and have met the related requirements of section 271 if it provides the initial set of interconnection points and unbundled elements specified by the Commission, and participates in the BFR procedure.⁸ Without such a rule, the long distance incumbents could delay long distance competition by continually requesting new elements to be unbundled, or by stringing out the BFR process.⁹

⁸ Contrary to the arguments of a few commenters, e.g., LDDS Br. at ii, 27, the Commission will continue to have the ability to ensure that RBOCs meet their obligations under §251, even after long distance entry. See §271(d)(6).

⁹ As its own internal documents reveal, AT&T has a long history of abusing its manufacturing dominance and participation in industry standards organizations to "delay[]," "stall," and "thwart" competition. AT&T memo dated August 5, 1993 from J.A. Marinbo to J.K. Brewington and G.I. Zysman; AT&T "NWSBU Strategic Plan Development" dated June 26, 1992.

B. The Commission Should Reject Arguments That Unbundling Requires LECs To Offer Fanciful “Concept[s]” Or To Redesign Their Networks At The Whim Of Competing Carriers

Not only have the long distance incumbents proposed extensive and unnecessary unbundling of the LECs’ networks, but they base their demands on unrealistic and misleading claims about the ease with which those elements can be unbundled.

In particular, AT&T purports to show that the ease with which unbundling the eleven network elements on its list can be readily provided by attaching simplified drawings of different parts of a hypothetical network and labeling its drawings with various “Industry Technical Standards.” AT&T Br., App. A. In reality, however, the listed standards in some instances do not even apply to the interconnection point or element for which AT&T cites them, and in others do nothing to explain how to accomplish the interconnection or unbundling AT&T purports to show.¹⁰

Also, the technical standards cited by AT&T were written to apply when a single provider operates the network as an integrated whole; they simply do not address the myriad of issues that arise when the network is no longer integrated -- either because various components are provided by different carriers or because multiple carriers interconnect at the same point. To

¹⁰ For example, the standards shown on pages 1 and 2 of AT&T’s Appendix A are intended to apply to the customer/network interface, not interconnection within the distribution network or at the switch in the central office as shown in AT&T’s drawings. Moreover, AT&T’s diagram on page 1 appears to show an analog customer/network interface, but the referenced standard applies to digital signals. The standards listed on pages 3-5 of AT&T’s Appendix A similarly are not helpful in explaining how to accomplish the unbundling or interconnection they purport to show. For example, page 3 does not provide a complete description of the interfaces depicted in the drawing. Page 4 describes the well-known and widely-used ASCII coded set of 128 characters, but does not address the basic protocols required to complete operator services transactions. Page 5 describes routing procedures and does not describe specific network interfaces at all

cite just one example, unbundled loops and subloops cannot be tested with the existing Mechanized Loop Test system once they are disconnected from the switch, and replacement systems must be designed and deployed once they are unbundled. See Bell Atlantic Br. at 31, Albers Decl. at 9. Other issues may arise in a multiple carrier environment that are not addressed by the existing standards which were written for a single provider environment. As a result, the Commission should not be lulled into a false sense of the ease with which unbundling can occur by AT&T's inaccurate citation of certain technical standards.

1. Sub-loop Unbundling Should Not Be Mandated

Sub-loop unbundling presents significant technical, operational and security hurdles, and cannot be achieved absent substantial additional developmental work. Bell Atlantic Br. at 23-24. It also is completely unnecessary for the competitive provision of local exchange service. Id. Significantly, in contrast to the claims of the long distance incumbents, the comments of a number of potential local competitors confirm that this is true, and that the Commission should not mandate sub-loop unbundling in its rules here. See, e.g., NCTA Br. at 41-42; Sprint Br. at 31-32.¹¹ Any requests for sub-loop unbundling should therefore be left to negotiations between the parties, subject to the safeguards provided by a bona fide request process.

2. The Commission Should Not Adopt The Undeveloped Switching Platform "Concept"

The long distance incumbents also argue that LECs should be required to offer a switching "platform" or "virtual lease of switching capacity." See, e.g., AT&T Br. at 21;

¹¹ Two of the categories of loops specified by MFS, "2-wire CSA links" and "4-wire CSA links," MFS Br. at 44, are actually forms of loop sub-elements, and the request to unbundle them should be left to negotiation between the parties for reasons set out above.

CompTel Br. at 33; LDDS Br. at 42-46. As these parties essentially admit, however, the switch platform is a pie-in-the-sky concept that is neither subject to concrete definition nor necessary for competing carriers to provide competing local service. In fact, the platform concept has never been implemented, or even attempted in the real world, and has yet to be approved by any state commission.¹² As such, it should be rejected.

First, the “switch platform” cannot even be defined let alone implemented. In telling contrast to the technical descriptions and standards for loop unbundling that have been proffered by various parties to this proceeding, no party has even attempted to provide a technical description of how unbundled switch capacity, or a switching “platform,” would work. Indeed, LDDS, its leading proponent, admits that the switch platform is a “concept” that “is still under development at the state commission level.” LDDS Br. at 55. As TCG explains, the platform proposal is an ever changing target that already has magically morphed from a bundled resale model when it was first proposed, to a supposed unbundled network element today. TCG Br. at 42-43; see also Bell Atlantic Br. at 26 and Richardson Decl. at 5-7.

Second, the switch platform would allow long distance companies to reconfigure the LEC switch to their heart’s delight, regardless of whether doing so would interfere with other features that the LEC or other competing carriers might be using. As explained in our initial comments, and as Sprint and others confirm, the switch simply cannot be partitioned to allow one carrier to use the capacity in a manner at odds with the use of another carrier. See Bell Atlantic Br. at 26; Albers Decl. at 14; Sprint Br. at 33-34. In addition to the myriad technical issues this creates, the Act only requires LECs to unbundle their existing networks, not

¹² Although some parties have described the switch platform as the “Illinois Model,” it was only recently included in a recommended decision by a hearing examiner and has not been approved by the Illinois commission

to redesign or reconfigure their networks to suit the varying desires of multiple new entrants. 47 U.S.C. § 153(29) (“‘network element’ means a facility or equipment used in the provision of a telecommunications service. . . . [and] features, functions, and capabilities that are provided by means of such facility or equipment . . .”) (emphasis added).¹³

By contrast, the local switch port is a defined service offering that Bell Atlantic already has tariffed. As we explained in our initial comments, the local switch port permits competing carriers to connect to a LEC’s switch and provides access to all of the functions of that switch -- including everything from dial tone and numbers to the ability to originate and terminate local and toll calls, and access to vertical and other services provided using the switch. Bell Atlantic Br. at 25. The local switch port, therefore, is technically feasible and fully complies with the requirement of the Act to provide “access to network elements on an unbundled basis.” 47 U.S.C. § 251(c)(3). (emphasis added.)

3. Access to Signaling and Databases Already is Unbundled

As the bulk of the comments filed here confirm, access to signaling and to databases necessary for call routing and completion already is available on an unbundled basis. See, e.g., Bell Atlantic Br. at 27-30; Sprint Br. at 39-41. Nonetheless, some parties (led by the long distance incumbents) erroneously claim that more should be required.

Signaling System 7. LECs already provide access to their SS7 networks at Signaling Transfer Points, or “STPs.” AT&T, however, claims that LECs should also be

¹³ To the extent the long distance incumbents suggest that leasing switch capacity under a platform model would force them to share the risk of the underlying investment with the LEC, they have matters backward. Because they could always deploy their own switch or change to another competitor’s switch, they are effectively insulated from the risk of the underlying investment. In reality, it is the LEC itself that will incur heightened risk under the platform model. Having engineered its systems to accommodate the capacity demands of a competing carrier, the LEC must bear the risk that it will be left holding the bag.

required to provide access at other points, including Service Control Points, or “SCPs.” AT&T Br. at 23. As we explained in our opening comments and as Sprint and others have confirmed, see Bell Atlantic Br. at 26; Sprint Br. at 40, today’s SS7 network simply is not designed in a way that permits direct access at the SCP. In fact, AT&T itself admits as much when it suggests that the Commission “could require requesting carriers to access ILEC SCPs through ILEC STPs.” AT&T Br. at 24 n.25. Moreover, affording access at the STP already allows other carriers to offer any services that use SS7 functions, see Bell Atlantic Br. at 27.

Databases and Support Systems. LECs already provide access to the databases needed for call routing and completion -- namely, Line Information Databases and 800 databases. Nonetheless, MCI claims that LECs also should be required to provide access to a variety of operations support systems, internal administrative systems, such as repair-dispatch systems and mechanized inventory listings, and systems containing customer proprietary network information. MCI Br. at 34. But as the Commission has correctly recognized, the Act requires unbundled access to databases only where “necessary for call routing and completion.” See NPRM at ¶ 107.¹⁴ The various systems cited by MCI -- to the extent they can even be considered databases at all -- simply do not meet this criteria.¹⁵

¹⁴ The legislative history makes clear that the network elements covered by the unbundling requirement are those a LEC “must provide for certain purposes under other sections of the conference agreement.” H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 116 (1996). Those “other sections” explicitly require access only to databases “necessary for call routing and completion.” 47 U.S.C. § 271(c)(2)(B)(x).

¹⁵ Other parties argue that such “back-office” systems are network elements that must be unbundled, that access to such systems is necessary to make interconnection provided to competing carriers “equal in quality,” and that access is somehow necessary to ensure that the terms on which interconnection and network elements are offered are “just, reasonable, and nondiscriminatory.” See, e.g., ACSI Br. at 44; CompTel Br. at 37-38; TCG Br. at 38-39. The variety of attempts to shoe-horn such systems into the Act’s provisions merely highlights the fact that the Act nowhere requires that incumbent LECs provide access to such systems: they

In addition, AT&T actually goes so far as to claim that it not only should be allowed to obtain direct access to LEC databases and other systems, but should also be allowed to freely populate them with its own information or to change the information already there. AT&T Br. at 24-26. But the statute nowhere authorizes AT&T to appropriate the LECs' systems in this way. Moreover, granting every provider free rein to change the information in all these systems effectively would allow competitors to alter records at will, making the slamming problems of the past seem like minor annoyances by comparison.¹⁶

In any event, these various systems were designed to operate in a single-provider environment, and are not readily adaptable for multiple users. And while Bell Atlantic favors the development of cooperative engineering, maintenance, and provisioning practices with co-carriers -- indeed, Bell Atlantic already exchanges ordering and repair information electronically with some of the larger interexchange carriers -- it is clear that implementation of such access is not required by section 251 or section 271 of the Act.

Advanced Intelligent Network. The long distance incumbents also attempt to re-argue the AIN access issues that have been debated at length in the Intelligent Network docket. The only point at which it is technically feasible to provide AIN access, however, is at the Service Management, or "SMS," level, and providing such access would allow other providers

are not "facilit[ies] or equipment used in the provision of a telecommunications service" nor "features, functions, and capabilities of such facilities or equipment," 47 U.S.C. § 153(29); nor are they necessary for carriers to offer competing services -- there are numerous resellers of Bell Atlantic's services operating successfully today without direct access to any of these systems.

¹⁶ To cite just a few examples, granting other providers unrestricted access to LECs' databases and support systems would enable competitors to change a customer's PIC, to change a customer's bill, or to otherwise change the characteristics of the customer's service without its consent.

to obtain access to the full range of AIN capabilities and to provide their own services. Bell Atlantic Br. at 29. In contrast, providing direct or unmediated access, as the long distance incumbents propose, would merely allow them to prevent customers from choosing different companies for different services -- as providing access at the SMS level would allow them to do. See, e.g., Ex Parte Letter to Regina Keeney, FCC, from Sandra Wagner, CC Dkt 91-346 (May 28, 1996) (on behalf of joint LECs).

V. The Commission Should Reaffirm Its Previous Physical Collocation Policies

As we showed in our opening comments here, no purpose would be served by re-litigating the Commission's previous physical collocation policies here, but some parties nonetheless attempt to do precisely that.

First, these parties urge the Commission to allow them to physically collocate any type of equipment, regardless of whether it is needed to connect to the LECs' networks. See, e.g., MCI at 23-25. In fact, they go so far as to claim that collocators should be allowed to set up shop in the LECs' central offices merely to connect to one another's services, regardless of whether they ever connect to the LECs' network. Id. The Act, however, only provides for physical collocation of "equipment necessary for interconnection or access to unbundled network elements." 47 U.S.C. § 251(c)(6) (emphasis added). It does not provide for collocation of other types of equipment or for other purposes, and extending the physical collocation requirement as these parties urge would constitute an unauthorized taking of the LECs' property in violation of the Fifth Amendment. See Bell Atlantic Telephone Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994).

Second, these parties urge the Commission to expand the definition of "virtual collocation" contained in the Commission's existing rules. See 47 C.F.R. § 64.1401(d) and (e).

Specifically, they claim that virtual collocation should include not just the placement of collocator-designated equipment on the LECs' premises, see id., but also should include so-called "mid-span meets" -- arrangements under which carriers connect with one another at a location between their respective networks. See e.g. TCG Br. at 26-30; ALTS, Att. A at 28-29. But these arrangements in no sense involve the collocation of equipment at LECs' premises, and are not "necessary" to interconnect with the LECs' networks.

Third, two parties urge the Commission to limit the ability of incumbent LECs to reserve space in their own central offices for the future expansion of their own services. See MCI Br. at 57; TRA Br. at 47.¹⁷ Again, however, the Commission's rules expressly allow the LECs to reserve a reasonable amount of space for their own future use. Changing the policy here would merely impair the ability of the LECs to serve their own customers.

Finally, these same parties claim that resellers should be able to purchase LEC transport services to the LECs' own central offices, and to thereby qualify for the lower cost access services provided to collocators without providing any facilities of their own. The Commission's rules, however, are intended to permit other facilities-based providers to collocate and interconnect with the LECs' networks, not just to give resellers a price break, and expressly require collocators to deliver their own optical fiber or microwave facilities to the LECs' premises. 47 C.F.R. §§64.1401(d)(2) and (e)(2).

¹⁷ Several parties also ask to be relieved of requirements to invest in cages and alarms in connection with physical collocation services. See ALTS Br. at 23; MCI Br. at 58; MFS Br. at 28-29. If the Commission removes this requirement, security measures would still be needed to separate collocators' space from LECs' equipment, and the Commission should make clear that LECs' cannot be held liable for any damage that may result when multiple collocators have access to each others' equipment.

VI. Prices Must Be Set Based on Total Costs

Although potential facilities-based competitors strongly oppose many arguments of the long distance incumbents, when it comes to pricing, some of these parties join ranks in a united quest for a free lunch -- a lunch paid for by the customers of the LECs. Specifically, they argue that the Act should be interpreted to require the LECs to set prices that are equal to total service long run incremental cost, or "TSLRIC." They are wrong.

1. TSLRIC-BS is not a relevant measure of cost. The long distance incumbents and their allies go so far as to claim that the relevant measure of TSLRIC is not the actual incremental costs of the LECs, but rather the incremental cost of an idealized, hypothetical network that a company might choose to build if it were starting from scratch on a blank slate, or "TSLRIC-BS." See, e.g., AT&T Br. at 49, 51, 57; MCI Br. at 61-70. The Act, however, can only be fairly read to give LECs the right to recover their costs, 47 U.S.C. § 252(d); it nowhere suggests that the LECs should be limited to the costs of a network that exists only in the fertile imagination of others. Nor would it make economic or policy sense to limit the costs that LECs can recover.

As explained in the accompanying reply declaration of Professor Kahn and Dr. Tardiff, using TSLRIC-BS as a pricing standard in a technologically dynamic industry like telecommunications will lead to "anticipatory retardation" in which the LECs forego investing in new technologies for fear they will quickly be overtaken by still newer and more efficient technology. Kahn Decl. at 3-4 (attached as Exh. 1). For this very reason, even perfectly competitive prices would never be set at the level of TSLRIC-BS, and requiring the LECs to do so here will undermine their incentives to invest additional amounts in their networks.

Moreover, as the Commission itself points out, NPRM at ¶ 12, the objective of the Act is to promote facilities-based entry where competitors can provide service more efficiently than the LECs. If it is possible to build a more efficient network, setting prices based on the LECs' actual costs will preserve the incentive to do so. In contrast, setting prices for network elements based on the costs of an idealized network would deter facilities-based entry by undermining those incentives. Kahn Decl. at 3-5. Since new entrants could not improve upon those already idealized costs by deploying their own facilities, they would have no reason to do so.

2. LECs must be allowed to recover joint and common costs. As some parties grudgingly concede, even setting prices equal to the LEC's actual TSLRIC -- as opposed to the BS variety -- would fail to recover the joint and common costs of operating the LECs' joint use networks. While it may not be possible to derive a single figure that can be applied uniformly to all LECs and to all their services or network elements,¹⁸ the basic point remains: setting prices at TSLRIC would deny LECs the ability to recover these costs.

Nonetheless, some parties claim that the amount of these costs should be de minimus, and, if they are not, that they must be attributable to inefficiency or to imprudent investments. AT&T Br. at 58. This argument is irrelevant and wrong. It is irrelevant because the Act allows LECs to recover their actual costs, not some theoretical portion of their costs that the long distance incumbents consider "efficient." It is wrong because the largest LECs have been subject to price cap regulation for over five years, and have had every incentive to squeeze

¹⁸ Sprint, for example, estimates the amount of these costs to be in the range of 15 percent. Sprint Br. at 48. In reality, this figure is on the low side, and Bell Atlantic has estimated the amount to be more on the order of 23 percent (approximately 15 percent shared and 8 percent common). See "Determination of Additional Contribution to Cover Forward Looking Shared and Common Costs" (attached as Exhibit 3 hereto).